Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DR. MARK F. ALEXANDER,

Petitioner,

v.

RUSH NORTH SHORE MEDICAL CENTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the exclusive use of the common law agency test to define an employment relationship as either "employee" or "independent contractor", without consideration of the economic realities of the particular case, wrongfully precludes Petitioner's Title VII action.

2. Whether the economic interdependence of Petitioner, an anesthesiologist with staff privileges at a hospital where he is entirely dependent upon the hospital to practice his profession and to earn his entire income, is such that he may maintain a Title VII action arising out of the wrongful termination of his privileges.

3. Whether the specific facts and circumstances of Petitioner's employment relationship, including the incident preceding his release from employment, evidence the Respondent's right to control the manner and result of Petitioner's work.

4. Whether it was improper for the Circuit Court to render its decision based upon an incomplete record.

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The Petitioner, Dr. Mark F. Alexander, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit entered into this proceeding on November 25, 1996, and its order denying a rehearing entered February 7, 1997.

OPINIONS BELOW

The Memorandum Opinion of the District Court for the Northern District of Illinois appears in the Appendix at App. 32. The Findings of Fact and Conclusions of Law of the District Court appears in the Appendix at App. 14. The opinion of the Seventh Circuit Court of Appeals, reported at 101 F.3d 487 (7th Cir. 1996), appears in the Appendix at App. 1. The unpublished Order of the Seventh Circuit Court of Appeals denying rehearing appears in the Appendix at App. 47.

JURISDICTIONAL STATEMENT

The opinion of the Seventh Circuit Court of Appeals was entered on November 25, 1996. The Order of the Seventh Circuit Court of Appeals denying a rehearing was entered on February 7, 1997. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e, 2000e-2 and 2000e-5 appear in the Appendix at App. 49.

STATEMENT OF THE CASE

The Petitioner, an Egyptian born Muslim, is an anesthesiologist who had staff privileges at the Respondent hospital (or its predecessor) since 1974. In 1976, the Petitioner changed his name from Mohammed Faoud Abd-Allah to Mark Alexander. Petitioner changed his name in order to gain greater acceptance from his patients and peers.

As an anesthesiologist, the Petitioner occupied a unique relationship with the Respondent. Unlike physicians with other areas of specialization, anesthesiologists cannot maintain private practices and can practice their specialty only through an affiliation with a hospital or similar medical facility that performs surgeries. As such, the Petitioner was totally dependant upon his affiliation with the Respondent or some other surgical facility in order to practice medicine.

When the Petitioner and other anesthesiologists were "on-call" with the Respondent, they were required to respond to telephone calls or pages within 20 minutes. They were further required to be within 45 minutes travel time of the hospital facility. The Petitioner and other anesthesiologists were required to travel to the Respondent's facility, if so requested by the on-duty emergency room physician.

The incident which gives rise to this case occurred on February 20, 1988. On that date, a patient who had suffered a head injury was taken to the Respondent's emergency room. The emergency room doctor decided to intubate the patient as a precaution to avoid aspiration. After these efforts to intubate the patient were unsuccessful, the emergency room physician paged two on-call

surgeons to perform a tracheostomy. Although an anesthesiologist was not required or contemplated for this procedure, the emergency room physician called the Petitioner to consult with him while awaiting return calls from the surgeons who were to perform the tracheostomy.

The emergency room doctor and the Petitioner gave different accounts of their conversation. The emergency room physician testified that she requested that the Petitioner come to the hospital. The Petitioner testified that this request was never made because he advised the emergency room physician that further attempts to intubate the patient could prove fatal and that the patient required a tracheostomy, a procedure which he was not qualified to perform.

It is uncontroverted that immediately after speaking to the Petitioner, the emergency room physician was contacted by one of the surgeons whom she had paged. The surgeon traveled to the hospital and performed the tracheostomy.

Not knowing that the surgeon had been contacted, the Petitioner called back the hospital shortly after speaking with the emergency room physician and spoke with a respiratory therapist. The Petitioner called for the purpose of asking if his help was actually needed with the patient. This issue was not resolved because during the course of the telephone conversation the respiratory therapist determined that the surgeon had been located and advised the Petitioner that the situation was under control.

Regardless of which version of the telephone conversation between the Petitioner and emergency room phy-

sician is believed, all involved agree that any action or inaction of the Petitioner did not harm the patient or lead to any claims being made against the Respondent or any of its employees or agents.

The day after the incident, the emergency room physician filed a complaint against the Petitioner. The Petitioner filed a written response to the complaint, pursuant to the request of the Respondent. Several weeks later, the Petitioner was informed that his staff privileges had been revoked because of his alleged refusal to travel to the emergency room.

The Petitioner filed suit in the District Court for the Northern District of Illinois, alleging unlawful discrimination by Respondent in violation of Title VII of the Civil Rights Act of 1964. The Respondent moved for summary judgment on two grounds. First, the Respondent argued that the Petitioner could not bring a Title VII action because he was an independent contractor, rather than an employee. The trial court rejected this argument in reliance on the controlling case of *Doe v. St. Joseph's Hospital of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986).

Second, the Respondent moved for summary judgment based on an alleged lack of evidence to support the Petitioner's Title VII claim. In response, the Petitioner presented his evidence that employees or others associated with the Respondent had on several occasions made derogatory comments specifically addressing the Petitioner's religion and ethnicity. The Petitioner also presented evidence that four other physicians who violated the hospital's on-call policy, but who were not Egyptian or Muslim, were sanctioned much less severely. Finally, the Petitioner presented evidence which created

a fact question of whether he had violated the on-call policy in the first place.

In ruling on the second issue of the summary judgment motion, the trial court determined as a matter of law that the hospital honestly believed the Petitioner had violated the on-call policy. Based upon this ruling, the trial court ruled that the Petitioner could not claim at trial that the Respondent knew he had not violated the on-call policy. The Petitioner was limited to arguing that the extreme response of terminating his staff privileges constituted disparate treatment. In the course of this ruling, the trial court also held that two of the four doctors who were the subject of less severe sanctions presented different factual settings, and therefore the Petitioner could not present evidence of their relatively mild discipline to prove disparate treatment.

The judge who tried the case was different from the judge ruling on the summary judgment motion. The trial judge reaffirmed that, under the controlling authority of *Doe v. St. Joseph's Hospital*, the question of whether the Petitioner was an employee or independent contractor was not relevant. Both the Petitioner and Respondent were barred from arguing or presenting evidence on this issue. After hearing the evidence in its limited form pursuant to the predecessor judge's summary judgment ruling, the trial court found that the Petitioner had failed to demonstrate pretext because: 1) the two doctors who had previously been sanctioned less severely than Petitioner had not engaged in misconduct as serious as the Petitioner; and 2) the Petitioner failed to show a nexus between the past derogatory statements regarding the Petitioner's religion or ethnicity and the decision to revoke the Petitioner's staff privileges.

On appeal, the Seventh Circuit Court of Appeals overruled its own decision in *Doe v. St. Joseph's Hospital* and held that only an "employee", as that term is defined under traditional common law principles, could maintain a Title VII action. In reaching this holding, the Seventh Circuit relied upon cases dealing with the employment status of an airport limousine driver, *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996); and an insurance agent, *Knight v. United Farm Bureau Mutual Insurance Co.*, 950 F.2d 377 (7th Cir. 1991).

The Seventh Circuit then went on to determine that the Petitioner was not a common law employee of the Respondent, despite the fact that both sides were precluded at trial from presenting evidence on this issue. The Seventh Circuit relied upon random facts that had been placed in the record to prove or disprove the tried claims and strongly equated the Petitioner's position with that of the airport limousine driver in *Ost*. Because the Seventh Circuit ruled that the Petitioner's employment status (or lack thereof) precluded the Title VII action, it did not reach the remaining issues relating to the preclusion of evidence pursuant to the summary judgment order or the sufficiency of the Petitioner's proofs. Accordingly, the trial court's rulings on these issues have not been subject to review.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS AND RAISES THE QUESTION OF WHETHER THE EXCLUSIVE USE OF COMMON LAW AGENCY PRINCIPLES TO DEFINE EMPLOYMENT RELATIONSHIPS UNNECESSARILY NARROWS THE SCOPE OF TITLE VII PROTECTIONS, AND IF SO, WHAT STANDARD OR TEST SHOULD BE APPLIED TO DETERMINE THE PARTY'S EMPLOYMENT STATUS. THIS CASE PRESENTS QUESTIONS THAT HAVE NOT, BUT SHOULD BE, DECIDED BY THIS COURT.

The exclusion of an individual from maintaining a Title VII action solely on the basis of the label applied to his employment relationship is inconsistent with the remedial purpose of the Civil Rights Act of 1964. The courts must look at the particular facts of each case to determine the nature of the employment relationship. There is presently a conflict among the United States Circuit Courts as to which test should be used to determine the scope of Title VII protection in non-traditional employment relationships.

Title VII has long been recognized as "a remedial statute with a broad sweep." *Pullman-Standard v. Swint*, 456 U.S. 275, 276, 102 S.Ct. 1781, 72 L.Ed.2d 64 (1982). This Court previously stated that the Congressional objective of Title VII is to achieve equality of employment opportunities. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). "Where federally protected rights have been invaded, it has been the rule from the beginning that Courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 674, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

Prior to Petitioner's case, the Seventh Circuit liberally construed Title VII "in keeping with its remedial purpose." *Verpinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 889 (7th Cir. 1996), (*citing Doe v. St. Joseph's Hospital of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986), as evidence of its generous construction in Title VII actions.) The Seventh Circuit "specifically afforded the term 'employee' a generous construction, noting that is was important to do so in order to further the goals and purposes of eliminating discrimination in employment". *Verpinsky* at 889.

However, in reaching its holding in Petitioner's case, the Seventh Circuit turned a blind eye to the Congressional goals of Title VII and held that, under a common law employee/independent contractor test, Title VII affords no scope of protection to individuals where the details concerning performance of the work remained essentially within the control of the individual rather than the employer. In overruling its previous decision of *Doe v. St. Joseph's Hospital of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986), and failing to follow *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973), the Seventh Circuit adopted the common law employee/independent contractor test which, ipso facto, labeled the Petitioner an independent contractor, and effectively precluded him from Title VII protections, despite the economic realities of the relationship which demonstrate complete dependence upon the Respondent for access to employment and to earn an income.

Despite specifically articulating in *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378 (7th Cir. 1993) that it had retained an "economic realities" test for Title VII actions, the Seventh Circuit failed to apply the

test in Petitioner's case. Rather, it used a partial application of the common law employee/independent contractor test, with a particular emphasis on the employer's right to control both the results achieved and the details by which the result is achieved.

The Seventh Circuit justified its use of the control-oriented common law agency test by reliance upon *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). However, as early as the 1940s, this Court rejected similar common law "right to control" tests and adopted the broader economic realities test to distinguish independent contractors from employees, in order to effectuate the remedial purpose of social welfare and antidiscrimination legislation. *See e.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944); *United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947). The adoption of *Darden's* control-oriented common law agency test unduly restricts Title VII protections and is contrary to the express Congressional objective to achieve equality of employment.

The flawed result of Petitioner's case is also in conflict with decisions rendered in other Circuits. The Sixth Circuit has construed Title VII to include protection for independent contractors where economic realities required its scope of protection. *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983). The Sixth Circuit has also applied both the economics realities test and the *Darden* control-oriented common law agency test in the same action. *Simpson v. Ernst & Young*, 100 F.3d 436, 443 (6th Cir. 1996). Notably, the claimants in those cases were allowed to present complete evidence of their relationship with their employer.

The Fifth Circuit has adopted a "hybrid test" that utilizes the economic realities test and the control-oriented common law agency test to determine an employment relationship. Its test examines both control and economic ties between the individual and the employer. *Field v. Hallsville Independent School Dist.*, 966 F.2d 1017, 1019 (5th Cir. 1990).

The Tenth Circuit, however, in its version also entitled a "hybrid" test, rejected the economic realities test. It has held that its "hybrid test" is similar to the "common law test" but states that it allows for consideration of economic factors in appropriate circumstances, without defining those nebulous "appropriate circumstances." *Lambertsen v. Utah Dept. of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996).

Similar to the Seventh Circuit, the Eighth Circuit has rejected the economic realities test in light of *Darden*. It acknowledged that the former "application of the economic realities test result[ed] in Title VII coverage for some common law independent contractors because they are vulnerable to discrimination arising in the course of their work." *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105-106 (8th Cir. 1994). However, the Eighth Circuit noted that *Darden* precludes the application of an economic realities test, "because the economic realities test is based on the premise that the term ["employee"] should be construed in light of Title VII's purpose and the construction is broader than at common law." *Id.*

The Eighth Circuit's statement unknowingly acknowledges the absurdity of using the *Darden* control-oriented common law test in Title VII actions. Regardless of which test a court adopts, the fact remains that indepen-

dent contractors are vulnerable to discrimination arising in the course of their work. By the imposition of the control-oriented common law test rather than the economic realities test (or even a combination thereof), the courts have placed a severe limitation upon who may be labeled an "employee", and in so doing, have defeated Title VII's primary objective.

The jurisdictional and standing issues raised in Petitioner's case are also significant, as illustrated by the procedural difficulties and inefficiencies which developed in this case. Until there is uniformity in determining the scope of protection afforded an individual under Title VII based upon his relationship with an employer, regardless of the label given, trial courts will be faced with uncertainty in not only how to rule upon this issue, but also in determining whether to allow what is probably far reaching discovery and evidence regarding the nature of the relationship between the parties.

In the present case, the trial judge relied upon the Seventh Circuit precedent, namely *Doe v. St. Joseph's Hospital*, to exclude evidence on the employee/independent contractor issue. Although some evidence relevant to this issue was presented in relation to the other issues before the court, the issue itself was not fully tried. When the Seventh Circuit resolved the conflict that existed in its own decisions by holding that an independent contractor could not maintain a Title VII action, it was faced with an incomplete record from which to determine the Petitioner's status.

Rather than remand this case to the district court for a re-trial to determine whether the Petitioner was an employee or an independent contractor, the Seventh Cir-

cuit reviewed the limited evidence in the record and took its best guess. The Seventh Circuit focused on the employer's right to control the manner in which work was performed, and found the position of the Petitioner-physician "strikingly similar" to that of the airport limousine driver in *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996).

The Seventh Circuit's approach superficially equated a physician with a limousine driver, while completely ignoring evidence of the unique economic interdependence between Petitioner and Respondent. Because the Petitioner is an anesthesiologist, he can practice his profession only in conjunction with a surgical unit. The revocation of his staff privileges by the Respondent has effectively blackballed the Petitioner from working in his profession and foreclosed his access to employment. If, in fact, the Petitioner was required to prove that he was an employee to maintain a Title VII action against the Respondent, he should have been allowed the opportunity to present all of his evidence on this issue.

Moreover, the Seventh Circuit's opinion is ironic in light of the fact that, under its own common law employee/independent contractor test, the primary indicium of an "employee" is a substantial degree of control by the employer. The incident which at least pretextually led to the revocation of the Petitioner's staff privileges involved the Respondent's unquestioned right to exercise control over the Petitioner. The Respondent determined when the Petitioner was on call, where he was to be when on call, and how he was to respond to calls from the emergency room. If the Respondent is to be believed, the Petitioner was punished for not responding to the directions

of another agent of the Respondent. The Petitioner was to have assisted or performed a medical procedure he did not feel qualified to perform, on a patient supplied by the Respondent (as were virtually all of Petitioner's patients), at the facility operated by the Respondent, using the equipment supplied by the Respondent, with the assistance of the Respondent's other employees and/or independent contractors.

The Petitioner certainly had a substantial factual basis to support his claim that he had an employment relationship with the Respondent that would entitle him to protection under Title VII. He was entitled to fully develop this topic at a trial before a fact finder who could observe and weigh the credibility of the witnesses before imposing the death sentence on the Petitioner's professional career. The Seventh Circuit's cavalier treatment of this issue so departs from the usual and accepted course of judicial proceedings that it alone warrants review from this Court.

CONCLUSION

For the reasons contained herein, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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May 7, 1997

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-2782

DR. MARK F. ALEXANDER,

Plaintiff-Appellant,

v.

RUSH NORTH SHORE MEDICAL CENTER,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6125—**Samuel P. King, *Judge*.***

ARGUED MAY 31, 1996—DECIDED NOVEMBER 25, 1996

Before BAUER, FLAUM, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. This appeal invites us to reconsider our divided decision in *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986), concerning whether a self-employed physician with staff privileges at a hospital may bring a Title VII action alleging that the hospital's revocation of his privileges constituted unlawful discrimination. Finding *Doe*'s holding—that a physician

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* A partial summary judgment in this case was granted by Judge James H. Alesia of the Northern District of Illinois. Trial was conducted by Judge Samuel P. King of the District of Hawaii, sitting by designation.

may bring such an action even absent proof of an employment relationship with either the hospital or his patients—to be irreconcilable with our later decisions in *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377 (7th Cir. 1991), and *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996), we overrule *Doe* and affirm the district court's judgment in favor of the hospital.**

I. HISTORY

The plaintiff in this case is an Egyptian-born Muslim and a physician. He became affiliated with and was granted staff privileges as an anesthesiologist at Skokie Valley Hospital in 1974. Two years later Mohammed Faoud Abd-Allah changed his name to Mark Alexander in what he testifies was an attempt to gain greater acceptance among the patients and staff at the hospital. In 1987, Skokie Valley Hospital merged with Rush-Presbyterian Hospital, and from then on it became known as Rush North Shore Medical Center (Rush North Shore).

After the merger, Dr. Alexander continued to have staff privileges as an anesthesiologist at Rush North Shore. As a condition of his privileges, Dr. Alexander was required to spend a specified amount of time per week "on call" to the hospital's emergency room. Rush North Shore's on-call policy, adopted in November 1985, requires a physician on call to be reachable by pager or by phone, to call the hospital within twenty minutes of being paged, to remain within forty-five minutes potential travel time to the hospital, and to come to the hospital if requested to do so by the emergency room physician on duty.

At 6:00 P.M. on February 20, 1988, a patient who had suffered a head injury rendering her comatose was brought

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** This opinion was circulated among all judges of this court in active service pursuant to Circuit Rule 40(f) because it overrules *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986). No judge requested rehearing *en banc*.

into the Rush North Shore emergency room. The patient suffered from internal cranial bleeding and had vomited earlier, but she was breathing on her own. Shortly after her arrival at the emergency room, the patient vomited again. Dr. Patricia Bitter, the emergency room physician on duty, attempted several intubations (both through the mouth and with a fiberoptic scope through the nose) to prevent potential aspiration, but her attempts were unsuccessful. Dr. Bitter paged two on-call surgeons who could perform a tracheostomy (a surgical procedure for creating an airway through the throat). While awaiting the surgeons' responses, Dr. Bitter phoned Dr. Alexander for help.

Dr. Bitter claims that she asked Dr. Alexander to come in and assist with intubating the emergency room patient, but that he refused to report to the hospital. Dr. Alexander, on the other hand, maintains that Dr. Bitter never actually requested his presence. He contends that after Dr. Bitter called him and explained the situation, he informed her that in light of the bleeding and swelling in the patient's throat caused by her failed intubation attempts, any further efforts to intubate could prove fatal. Dr. Alexander states that he told Dr. Bitter that the patient was in need of a tracheostomy, a procedure that, as an anesthesiologist, he was not qualified to perform. He claims that he told Dr. Bitter he would remain available to come into the hospital if his particular skills were needed, but that she left him waiting on hold and never asked him to come in.

After speaking with Dr. Alexander, Dr. Bitter immediately received a call from Dr. Upendranath Nimmigadda, a surgeon whom she had paged earlier. Dr. Nimmigadda came into the hospital and performed a tracheostomy on the patient. Dr. Bitter told Dr. Nimmigadda that Dr. Alexander had refused to assist her after apprising her that Rush North Shore did not possess a suitable fiberoptic laryngoscope for nasal intubation.

Meanwhile, Dr. Alexander called the emergency room again and was put in touch with Jake Strykowski, a respi-

ratory therapist at the hospital. Dr. Alexander asked if the emergency room patient "really needed" his help. Strykowski claims that he told Dr. Alexander that the patient was becoming increasingly unresponsive and that they had contacted Dr. Alexander because of their inability to intubate, but that Dr. Alexander claimed he did not have experience with Rush North Shore's flexible fiberoptic equipment. Strykowski states that he informed Dr. Alexander that the hospital did have the equipment that he was accustomed to, but that by that time Dr. Nimmigadda had been secured and the situation was under control.

The next day, Dr. Bitter filed a complaint concerning the incident. The hospital investigated her allegations, gathering the statements of Strykowski and Drs. Bitter, Alexander, and Nimmigadda. After consideration and deliberation by several panels of the hospital's hierarchical internal review structure, the board of trustees informed Dr. Alexander by letter that his staff privileges had been revoked for violation of the hospital's on-call policy.

Dr. Alexander filed a charge with the Illinois Department of Human Rights and with the Equal Employment Opportunity Commission, alleging that Rush North Shore had revoked his staff privileges not because he had violated the hospital's on-call policy, but because of his religion and national origin. Both the IDHR and the EEOC investigated and dismissed Dr. Alexander's charge, finding no evidence of discrimination.

Thereafter he filed suit in the Northern District of Illinois, claiming that Rush North Shore's revocation of his privileges constituted unlawful discrimination in violation of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.* After discovery, Rush North Shore moved for summary judgment on two grounds: (1) that Dr. Alexander was precluded from bringing a Title VII action against the hospital because the undisputed facts in the record demonstrated that he was an independent contractor, rather than an employee of the hospital; and (2) that

Dr. Alexander could put forth no evidence demonstrating that Rush North Shore's proffered reason for the revocation of his privileges—i.e., its belief that Dr. Alexander engaged in serious misconduct but had failed to acknowledge his wrongdoing or to provide any assurance that the conduct would not recur—was a pretext for unlawful discrimination.

In an effort to demonstrate that Rush North Shore's articulated reason for his privilege revocation was pretextual, Dr. Alexander offered evidence attempting to show (1) that various Rush North Shore personnel had on several occasions in the past made derogatory remarks concerning his religion and ethnicity; (2) that he had engaged in no wrongdoing on the night in question; and (3) that Rush North Shore had imposed much less serious sanctions on four other physicians, Drs. Britt, Taxman, Abrams, and Friedman, who had violated the on-call policy in the past but who were not Egyptian or Muslim.

In ruling on the motion for summary judgment, *Alexander v. Rush North Shore Medical Center*, 851 F. Supp. 330 (N.D. Ill. 1994), the district court held first that, under *Doe v. St. Joseph's Hospital*, it was unnecessary for Dr. Alexander to demonstrate an employment relationship with the hospital in order to maintain a Title VII action; the district court found it sufficient for Dr. Alexander to have alleged that the hospital discriminatorily interfered with the business relationships he had with his present or potential patients. Secondly, the district court found there to be no triable issue as to whether the hospital honestly believed that Dr. Alexander's misconduct occurred. Thus, Dr. Alexander was precluded from claiming at trial that the hospital knew he had not violated the on-call policy; he was limited to arguing that their harsh response to his alleged wrongdoing constituted disparate treatment. Finally, the district court found it indisputable based on the facts in the record that two of the four doctors, Drs. Britt and Taxman, were not similarly situated with Dr. Alexander and, therefore, that their relatively lighter sanctions were not evidence of pretext.

After a trial, the district court determined that Dr. Alexander had failed to prove by a preponderance of the evidence that Drs. Friedman and Abrams had engaged in misconduct as serious as his own but had nonetheless been treated more favorably, nor that there was a nexus between any past derogatory remarks concerning Dr. Alexander's religion or ethnicity and the board's decision to revoke his privileges. Thus, the district court found that Dr. Alexander had failed to demonstrate pretext, and it entered final judgment in favor of Rush North Shore. Dr. Alexander appeals both the entry of partial summary judgment and the district court's final judgment after trial.

II. ANALYSIS

In deciding this appeal, we need turn no further than to the district court's ruling on Rush North Shore's motion for summary judgment, citing *Doe v. St. Joseph's Hospital*, that Dr. Alexander could maintain a Title VII action against Rush North Shore even absent a demonstration of an employment relationship between himself and the hospital. We exercise plenary review over a district court's decision concerning summary judgment, drawing our own conclusions of law and fact from the record before us, *Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 181 (7th Cir. 1995), and it is well settled that we may affirm the judgment of the district court on any sufficient basis supported by the record, *Burda v. M. Ecker Co.*, 2 F.3d 769, 773 (7th Cir. 1993). Under FED. R. CIV. P. 56(c), summary judgment is appropriate if "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law."

In *Doe*, St. Joseph's Hospital revoked a physician's staff privileges as a disciplinary measure after the hospital's internal review board ruled against her in proceedings concerning a complaint filed by another physician. After the appropriate administrative filings proved unsuccessful, Doe (the aggrieved physician) filed an action in district

court alleging, among other things, that the hospital's revocation of her privileges constituted unlawful racial discrimination in violation of Title VII. The district court, however, dismissed Doe's suit at the pleading stage because she did not contend that she was an employee of the hospital.

On appeal, in a divided decision, we held that the dismissal was unwarranted because it was unnecessary for Doe to allege an employment relationship with the hospital in order to maintain a discrimination suit against it. *Doe*, 788 F.2d at 422-25. Title VII provides, in part, that it is unlawful for an employer:

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). The *Doe* majority opined that because this section expressly applies to "any individual" rather than to "any employee," interpretively restricting the Act's protection to only former, present, and potential employees would be inconsistent with our charge to construe Title VII "liberally so as to further the goals and purposes of eliminating discrimination in employment." *Id.* at 422 (quoting *Unger v. Consolidated Foods Corp.*, 657 F.2d 909, 915 n.8 (7th Cir. 1981), *vacated on other grounds*, 456 U.S. 1002 (1982)). Given that the Act outlaws employer discrimination against "any individual" with respect to his "privileges of employment," the *Doe* majority held that Doe needed only to show that the hospital met the statutory definition of an "employer" and that it interfered with her present or future employment opportunities on the basis of her membership in a protected class. 788 F.2d at 422-23 (relying on *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973), and *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089 (D.N.H. 1974)).

The partial dissent argued that it was impossible for the hospital to have interfered with Doe's employment

opportunities because, under the common law meaning of "employee," Doe was not employed by her patients any more than she was employed by the hospital. *Doe*, 788 F.2d at 427 (Ripple, J., concurring in part and dissenting in part). The partial dissent maintained that Doe was instead an independent contractor and, thus, that she was precluded from bringing her suit against the hospital because she did not fall under Title VII's protection. *Id.* To this, the majority responded that perhaps the common law employee/independent contractor dichotomy was inappropriate as applied to antidiscrimination legislation. *Id.* at 424-25 & n.28. The majority concluded that dismissal of Doe's claim was inappropriate even though she could not demonstrate an employer-employee relationship with either her patients or the hospital, so long as she could show that the hospital interfered in some way with her economic possibilities. *Id.* at 425.

Doe's conceptual underpinnings, however, can no longer hold fast after our more recent decisions in *Knight v. United Farm Bureau Mut. Ins. Co.*, and *Ost v. West Suburban Travelers Limousine, Inc.* The *Knight* case concerned an insurance agent who brought a Title VII sex discrimination action against the insurance company with which she was affiliated. 950 F.2d at 377. Similarly, *Ost* involved an airport limousine driver who brought a Title VII sex discrimination claim against her dispatching company after the company terminated its business relationship with her. 88 F.3d at 436. In deciding both *Knight* and *Ost*, we looked—contrary to *Doe*'s assertion that the common law employee/independent contractor framework is inapplicable to a Title VII action—to whether under a test of common law agency principles the plaintiff was an employee of the defendant or an independent contractor. *Knight*, 950 F.2d at 378-81; *Ost*, 88 F.3d at 437-40. We then affirmed the district court judgments against the plaintiffs in both cases, announcing the rule—contrary to *Doe*'s holding that a doctor can maintain a Title VII action even if he is an employee of neither the hospital nor his own patients—that a plaintiff "must prove the exist-

ence of an employment relationship in order to maintain a Title VII action against [the defendant]," and that "[i]ndependent contractors are not protected by Title VII." *Knight*, 950 F.2d at 380; *accord Ost*, 88 F.3d at 440. It was insufficient that United Farm Bureau Mutual Insurance Co. interfered with Knight's present and potential business opportunities with her clients, or that West Suburban Travelers Limousine, Inc., interfered with Ost's economic possibilities with her customers. The simple fact that the plaintiffs were not employees, that they could not demonstrate the existence of an employment relationship, rendered them without the ambit of Title VII protection and precluded them from bringing discrimination actions alleging violations of the Act.

Application of this rule in *Doe*—where the plaintiff conceded that she was not an employee of the hospital and, thus, was an independent contractor—would have effected precisely the opposite result from that reached in *Doe*'s majority opinion.

On the other hand, it could be argued that a physician who enjoys hospital staff privileges does, under certain factual situations, share an indirect employer-employee relationship with the hospital sufficient to invoke Title VII protection. *Cf. Shrock v. Altru Nurses Registry*, 810 F.2d 658, 660 (7th Cir. 1987) (implying that *Doe* and *Sibley* may be factually distinguishable from the rule that Title VII does not cover independent contractors in that there may be an "indirect employer-employee relationship" between the hospital and the physician or nurse). Dr. Alexander attempted just this at summary judgment by arguing that on the basis of the undisputed facts, he was an employee of Rush North Shore as a matter of law.

Dr. Alexander's claim, however, is untenable in light of our employee/independent contractor analysis in *Ost*. There, we applied a common law test, which "involves the application of the general principles of agency to the facts," *Knight*, 950 F.2d at 378, in order to determine whether Ost, a limousine driver, was an employee of the

dispatching company or an independent contractor. *Ost*, 88 F.3d at 437-38. The test requires us to focus on five factors:

> (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.

Ost, 88 F.3d at 438 (quoting *Knight*, 950 F.2d at 378-79).[1] "Of [the] several factors to be considered, the employer's

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[1] The Supreme Court recently authorized applying a similar control-oriented agency test to determine whether an individual is an employee under the Employee Retirement and Income Security Act ("ERISA"), a statutory codification that defines "employee" at 29 U.S.C. § 1002(6) in the same circular manner as does Title VII at 42 U.S.C. § 2000e(f). *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24, 112 S. Ct. 1344, 1348 (1992). The Supreme Court explained:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52, 109 S. Ct. 2166, 2178-79 (1989)). Just as we held

(Footnote continued on following page)

right to control is the most important when determining whether an individual is an employee or an independent contractor." *Knight*, 950 F.2d at 378; *accord Ost*, 88 F.3d at 438. Thus, "[i]f an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist." *Ost*, 88 F.3d at 439 (quoting *Spirides v. Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir. 1979)).

Looking to these five criteria, paying special attention to potential employer control over the manner in which work is accomplished, one finds that the business relationship between Dr. Alexander and Rush North Shore is strikingly similar to that shared by Ost and West Suburban Travelers Limousine. In *Ost*, West Suburban drivers were skilled in more mundane ways, but they owned their own limousines; they were responsible for paying their own insurance premiums, license fees, and employment taxes; they collected their own fees directly from customers and never received paychecks from West Suburban; they were able to work on those days that they preferred; they could choose the routes by which they would reach desired destinations; and they were allowed to work for other dispatching services if they wished to do so. 88 F.3d at 438. From this, we determined that "[e]ach of these facts indicates that the manner in which the drivers performed their services for West Suburban was primarily within their own control." *Id.*

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[1] *continued*
in *Knight*, the Supreme Court identifies the employer's control over the manner of work performance as the test's primary focus. The other factors mentioned are essentially subsumed within (and therefore equivalent to) the *Knight* five-factor test. *See Knight*, 950 F.2d at 379 n.2 (finding that the five-factor inquiry adequately addresses the more numerous factors considered by some other courts).

Similarly, Dr. Alexander did not supply his own equipment or assistants, but he did possess significant specialized skills; he listed his employer on income tax returns as Central Anesthesiologists, Ltd., his personal wholly-owned professional corporation that was responsible for paying his malpractice insurance premiums, employment benefits, and income and social security taxes; he was responsible for billing his patients and he collected his fees directly from them; he never received any compensation, paid vacation, private office space, or any other paid benefits from Rush North Shore; he had the authority to exercise his own independent discretion concerning the care he delivered to his patients based on his professional judgment as to what was in their best interests; he was not required to admit his patients to Rush North Shore; and he was free to associate himself with other hospitals if he wished to do so. As in *Ost*, it seems clear that the manner in which Dr. Alexander rendered services to his patients was primarily within his sole control.

Dr. Alexander argues that he was, in fact, an employee of Rush North Shore because he was required to spend a specified amount of time per week "on call" and because, by virtue of the nature of being an anesthesiologist, most of his operating room patients were assigned to him on a daily basis by the anesthesiology section head. Yet, Ost submitted similar evidence, noting that West Suburban determined its drivers' starting times, required them to call in when they signed off duty, assigned the drivers' morning passengers, required that the drivers' vehicles be made available during certain times, set the rates the drivers charged, and determined which drivers would receive which customers. *Ost*, 88 F.3d at 438. We held there that "[t]hese constraints do not, however, establish an employer-employee relationship because the details concerning performance of the work remained essentially within the control of the driver." *Id.* at 438-39. The same is true of this case, and we must find that on the basis of the undisputed facts in the record, Dr. Alex-

ander is an independent contractor as a matter of law.[2] Given that *Doe*'s holding is inconsistent with *Knight* and *Ost*, Dr. Alexander's status as an independent contractor precludes him from bringing a Title VII action against the hospital, and thus the entry of summary judgment against Dr. Alexander would have been appropriate. The ultimate disposition at trial provided a correct result and the judgment of the district court in favor of Rush North Shore is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] We come to the conclusion that Dr. Alexander is an independent contractor because he is also not an employee of his patients, just as an insurance agent or a limousine driver is not an employee of her customers. It is important to note that our ruling today is limited to overturning *Doe*'s holding that a physician may bring a Title VII action against a hospital even though he is an independent contractor and not an employee. We have no occasion to go further and determine if a Title VII plaintiff must always demonstrate that he is an employee *of the defendant employer*. Thus, we continue to leave open the question that went unanswered in *Shrock*, 810 F.2d at 660—*i.e.*, whether an employee of employer *X* may bring a Title VII action against employer *Y* when *Y* is not his employer, but merely someone whose discriminatory conduct interferes with his employment with employer *X*.

App. 14

[Dated June 26, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DR. MARK F. ALEXANDER, Plaintiff,	)	
v.	)	No. 92 C 6125
RUSH NORTH SHORE MEDICAL CENTER, Defendant.	)	Hon. Samuel P. King

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

I. OVERVIEW

Plaintiff Dr. Mark F. Alexander ("Dr. Alexander"), an anesthesiologist, contends Defendant Rush North Shore Medical Center ("Rush" or "the hospital") violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e ("Title VII") by terminating his staff privileges. He seeks back pay at the rate of $300,000 per year since his termination in 1988 as well as costs and attorneys' fees for the prosecution of the instant action. The case was tried to the court from April 24-28, 1995.

II. FINDINGS OF FACT

Dr. Alexander enjoyed staff privileges at Rush, formerly known as Skokie Valley Hospital ("Skokie"), from 1976

to 1988. To maintain such privileges, anesthesiologists and other specialists must agree to be "on-call" during certain periods to respond to emergencies at the hospital. If an emergency room physician asks an on-call doctor to go to the hospital to assist with a patient, the doctor must comply as a condition of maintaining staff privileges.

On February 20, 1988, emergency room physician Dr. Patricia Bitter was treating a patient who had suffered a head injury. Concerned that the patient's airway would become obstructed, Dr. Bitter performed an endotracheal intubation to open an airway for the patient. Her attempt to intubate the patient was unsuccessful. She then called Dr. Alexander, the anesthesiologist on call at the time. Dr. Bitter said after the incident that she asked Dr. Alexander to come to the hospital and assist with the patient, and he refused. Dr. Alexander maintains that Dr. Bitter never requested his presence, but rather "hung up" on him as he attempted to elicit more information from Dr. Bitter. Dr. Bitter eventually secured the assistance of another physician, Dr. Upendranath Nimmagadda, who performed a tracheotomy on the patient.[1]

Meanwhile, Dr. Alexander contacted a respiratory therapist at the hospital, Jake Strykowski, to inquire whether the patient "really needed" Dr. Alexander's

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[1] On July 5, 1995, Judge Alesia granted Rush's motion in limine to exclude expert medical testimony concerning the standard of medical care provided the patient by Dr. Bitter.

help.[2] According to Strykowski, he told Dr. Alexander that the patient was becoming increasingly unresponsive and the emergency room staff had called Dr. Alexander because of their inability to open an airway through intubation. Strykowski reported that Alexander complained that he was not experienced with the type of flexible fiberoptic equipment that the Rush emergency room used for the procedure in question. Strykowski contends that he told Dr. Alexander, however, that Rush did, in fact, have the type of equipment with which Dr. Alexander was familiar. Alexander later told the hospital that Strykowski indicated the situation was under control and could be handled by the emergency room personnel.

The next day, Dr. Bitter spoke to Dr. Abraham Chervony, then the hospital's vice president for medical affairs and a member of the Medical Executive Committee ("MEC") and Board of Trustees of Rush, to lodge a complaint about Dr. Alexander's conduct. The hospital conducted an investigation, gathering the written statements of Drs. Bitter, Nimmigadda and Alexander and respiratory therapist Strykowski. Upon a review of the statements, the MEC concluded that Dr. Bitter had indeed requested Dr. Alexander's assistance. The board voted to revoke Dr. Alexander's staff privileges. The Medical Appeals Board at the hospital agreed with the MEC's factual findings, but believed revocation of Dr. Alexander's staff privileges to be too harsh a sanction. The hospital's Board of Trustees, the final decision-

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[2] Mr. Strykowski was not a medical doctor and thus could not countermand Dr. Bitter's request.

maker, reviewed the evidence and also concluded that Dr. Alexander had failed to respond to a request for assistance. It agreed with the MEC that his privileges should be revoked. Through the three levels of review, nearly three dozen people were involved in deciding Dr. Alexander's fate. At trial, Plaintiff introduced evidence that Rush had previously experienced problems with doctors who had either refused to be placed on the specialty call roster for the emergency room or who had refused to respond to pages when on call. In response, Rush officials reminded the hospital's physicians via memoranda of their obligation to be on the roster and to respond when called.

Three incidents involving two other Rush physicians are of particular relevance in this case. Dr. Franklin Friedman apparently refused to respond to emergency room calls on at least two occasions, in March and May of 1986. Rush responded by suspending his privileges, lifting the suspension only after Dr. Friedman was voluntarily placed on indefinite leave, from which he did not return. Also in May 1986, Dr. Bernard Abrams failed to respond to a call from the emergency room. The hospital initially suspended Dr. Abrams, but reinstated him after he complained he had been denied due process. Abrams disputed the emergency room physician's version of events, but also assured Rush that he understood the hospitals on-call policy and procedures and would abide by them in the future.

Plaintiff also introduced evidence that over the course of his tenure at Rush he had been the subject of racial slurs by his colleagues, usually uttered behind his back. Barbara Artura, a surgical staff coordinator at Rush,

then Skokie, from 1977 to 1985, testified that some surgeons refused to work with Dr. Alexander and expressed their refusal with such phrases as "get that god-damned Arab out of my room," and "get that fucking Arab out of my room." Nina Kostur, an operating room technician at Skokie from 1975 to 1982, also testified that a number of surgeons at the hospital refused to work with Dr. Alexander, whom they referred to, somewhat less than affectionately, as "the Arab," occasionally embellishing the term with the same expletives testified to by Ms. Artura.

Plaintiff was not born with the name Mark Alexander. He testified at trial that he changed his name in 1976 from Muhammad Faoud Abdallah, partly in the hope of getting along better with the other doctors at Rush. Dr. Otto Trippel, a vascular surgeon who practiced at Skokie from the early 1960s to 1980, testified at trial that on one occasion shortly after Dr. Alexander had changed his name, Dr. Chervony remarked that "that stupid Arab changed his name" and privately ridiculed Dr. Alexander for thinking that he could hide his heritage by changing his name. Dr. Chervony died before the start of trial. He was deposed in November 1993 but was not asked about the comment attributed to him by Dr. Trippel.

Plaintiff testified that he was ignored by some colleagues and treated with open hostility by others. He testified that at least one physician mocked him by mimicking a Muslim engaged in traditional prayer. Dr. Alexander also claimed that he was assigned less lucrative procedures than other anesthesiologists and generally received unequal treatment in matters of scheduling, days off and vacation time. Since losing his privileges at

Rush, Dr. Alexander has attempted repeatedly to secure permanent employment elsewhere. However, the fact that he has had his privileges revoked by one hospital has proven an insurmountable obstacle to permanent employment at other hospitals.[3] He testified at trial that he has been able to obtain only temporary assignments, filling in for vacationing or ill anesthesiologists at various facilities.

III. PROCEDURAL BACKGROUND

A. Administrative Proceedings and the Instant Action

Dr. Alexander filed a charge of discrimination with the Illinois Department of Human Rights on October 21, 1988, contending that Rush terminated his privileges not because of the alleged misconduct, but because he was a brown-skinned Egyptian Arab and a member of the Muslim faith. The complaint was crossfiled with the Equal Employment Opportunity Commission ("EEOC"). The Department dismissed the charge, finding no evidence of discrimination. Dr. Alexander sought a review of the Department's decision by the Illinois Human Rights Commission, which upheld the Department's finding. The Commission denied Dr. Alexander's motion for reconsideration.

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[3] Unlike internists, pediatricians and other specialists, anesthesiologists cannot simply "hang out a shingle" and open their own, independent practices. Virtually all of their work is done in conjunction with surgeons operating in a hospital or similar facility.

The EEOC, meanwhile, issued a Notice of Right to Sue letter to Alexander on June 16, 1992. Dr. Alexander filed his original complaint in the instant action on September 14, 1992. The district court dismissed the original complaint on November 10, 1992, giving Alexander 20 days to file an amended complaint. He filed an amended complaint on December 3, 1992, three days after the deadline set by the court.[4]

B. Summary Judgment

On May 6, 1994, Judge Alesia granted in part and denied in part Rush's motion for summary judgment. See *Alexander v. Rush North Shore Medical Center*, 851 F.Supp. 330, 333 (N.D.Ill. 1994). The court's order significantly narrowed the issues for trial.

For one thing, Judge Alesia held, pursuant to established 7th Circuit law, that a doctor need not be directly "employed" by a hospital to merit protection under Title VII. *See Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 422-25. It is enough that the hospital be able to control the doctor's employment opportunities through the granting or withholding of privileges. Accordingly, Title VII applies to the instant case.

Additionally, the court found that Rush had conclusively established that at the time it suspended Dr. Alexander's privileges, it at least held an honest belief that he

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[4] Rush contends that Dr. Alexander's tardiness is itself sufficient reason to enter judgment in Rush's favor. The filing deadline is not jurisdictional, however, and the court prefers to deal with Dr. Alexander's claims on the merits. Accordingly, Plaintiff's pending motion to correct technical defects is moot.

had engaged in the misconduct alleged. Because the Seventh Circuit has held that an employer terminates an employee for a legitimate, nondiscriminatory reason if it "honestly believed" that an alleged instance of misconduct occurred, whether the alleged misconduct, in fact, occurred or not is irrelevant. *Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1133 (7th Cir. 1994). Accordingly, Judge Alesia's summary judgment order precluded Dr. Alexander from introducing evidence at trial to support his contention that he committed no misconduct.

Finally, Judge Alesia held that two of the four white doctors who Dr. Alexander claimed had engaged in similar misconduct but had gone unpunished—Drs. Britt and Taxman—were in fact not similarly situated, either because the alleged incidents involving the two doctors were not as serious, or because they had apologized and accepted responsibility for their conduct and had promised it would not be repeated.[5]

IV. CONCLUSIONS OF LAW

A. Plaintiff's Prima Facie Case

To establish a prima facie case of discrimination under Title VII, Plaintiff must demonstrate by a preponderance of the evidence that (1) he was a member of a protected class, (2) he was meeting the hospital's legitimate expectations (up to the time of the February 20, 1988 incident), (3) he was nonetheless discharged, and (4) the

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[5] On April 19, 1995, Judge Alesia denied Dr. Alexander's motion to reconsider the order of summary judgment with respect to Dr. Taxman.

hospital sought a replacement. See *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1261 (7th Cir. 1993).

The parties do not dispute the satisfaction of elements one, three and four. As for element two, Dr. Alexander testified at trial that no official at Rush had ever questioned his competence or job performance during the 12 years he was with the hospital. The testimony was uncontroverted. The court may also infer from Dr. Alexander's 12 years of uninterrupted service at Rush—and the absence of any evidence of disciplinary action during that period—that he was meeting the hospital's legitimate expectations. Accordingly, the court finds that Dr. Alexander has established a prima facie case of discrimination under Title VII.

B. Defendant's Legitimate, Nondiscriminatory Reason for Revoking Plaintiff's Privileges

Plaintiff's establishment of his prima facie case gives rise to a rebuttable presumption of discrimination, thus placing upon Rush the burden to articulate some legitimate, nondiscriminatory reason for revoking Dr. Alexander's privileges. *See St. Mary's Honor Center v.* Hicks, 113 S.Ct. 2742, 2747 (1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Rush has met this burden by pointing to the February 20, 1988 incident in which Dr. Alexander allegedly refused to go to the hospital in response to the call from the emergency room. It does not matter that Dr. Alexander continues to dispute Rush's version of what happened. Judge Alesia ruled on summary judgment that Rush held an "honest belief" that the incident in fact occurred. Under Seventh Circuit law, an employer terminates an employee for a legiti-

mate reason if it honestly believes that an alleged instance of misconduct actually occurred. *Lenoir*, 13 F.3d at 1133.

C. Pretext

Rush having met its burden to articulate a legitimate nondiscriminatory reason for revoking Dr. Alexander's privileges, "the presumption raised by the prima facie case is rebutted . . . and drops from the case." *Hicks*, 113 S.Ct. at 2747. Dr. Alexander may still prove Rush intentionally discriminated against him if he can show that its proffered reason for revoking his privileges was a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804.

1. Rush's Treatment of Similarly Situated Non-Egyptian, Non-Brown-Skinned and Non-Muslim Doctors

Especially relevant to a showing of pretext would be evidence that Rush treated other physicians not in the protected class, i.e., those of a different national origin, skin color and religion than Dr. Alexander, more favorably than Dr. Alexander even though such physicians engaged in misconduct at least as serious as that alleged against him. *Id.*

Prior to summary judgment, Plaintiff alleged that he was similarly situated to four white physicians at Rush. On summary judgment, Judge Alesia ruled that two of those physicians, Drs. Britt and Taxman, were not, in fact, similarly situated. Judge Alesia found that ques-

tions of fact precluded summary judgment as to the two other doctors: Drs. Friedman and Abrams.

As noted earlier, Dr. Friedman declined to accept responsibility for on-call assignments and refused on at least two occasions in 1986 to respond to calls from the Rush emergency room. Rush suspended Dr. Friedman's privileges, and he eventually went on an indefinite leave from which he did not return. Also in 1986, Dr. Abrams allegedly failed to respond to a call from the emergency room. Rush initially suspended his privileges, but reinstated them after he disputed the emergency room staff's version of events and after the hospital counseled him, and he apparently acknowledged, that a proper response to an emergency room call included a trip to the hospital to assess the patient.

Rush argues that the misconduct engaged in by Drs. Friedman and Abrams was of a less serious nature than that of Dr. Alexander. Rush, interpreting the relevant emergency room logs as introduced at trial, contends that Drs. Friedman and Abrams were asked only to accept responsibility for the patients in question, none of whom suffered from a life-threatening condition. Dr. Alexander, on the other hand, is alleged to have refused a specific request to come into the hospital to help with the treatment of a seriously ill patient. Rush also notes that in the cases of Friedman and Abrams, there was either a dispute (in Friedman's case) or some confusion (in Abrams' case) as to their obligation to respond to calls from the emergency room. Plaintiff, on the other hand, never disputed that he was on call, and that if called, he had a responsibility to go to the hospital. Finally, Defendant notes that Dr. Alexander refused to

acknowledge any error in his conduct or to assure Rush that the incident would not be repeated in the future. By contrast, Dr. Abrams assured hospital officials that he would respond to future calls and that the matter would not come up again. Dr. Friedman's refusal to be placed on the on-call roster led to his suspension and eventual departure from the hospital.

The court finds at least some of Rush's arguments on this point persuasive. Plaintiff has offered no evidence to contradict Rush's assertion, supported by entries in emergency room logs, that the condition of the patients involved in the Friedman and Abrams incidents was less serious than that of the patient in the February 20, 1988 incident involving Dr. Alexander.

Moreover, Dr. Friedman had apparently put Rush on notice that he was unwilling to accept responsibility for emergency room calls. Dr. Abrams apparently suffered from some confusion on this point. Dr. Alexander, on the other hand, was, according to his own testimony at trial, well aware of his obligation to respond to calls from the emergency room. He neither put Rush on notice that he would not respond to such calls nor suffered from any confusion as to his obligations.

It is also true that Dr. Alexander has been anything but contrite with respect to the allegations leveled against him by Rush. He has insisted from the start that he did nothing wrong and that, confronted with the same circumstances as on February 20, 1988, he would behave the same way again.

Plaintiff's position in this regard may be consistent with his insistence that he did not refuse a direct request by Dr. Bitter that he come to the hospital during the

incident in question. However, given what the court has found to be Rush's honest belief that Dr. Alexander did, in fact, refuse to respond to a call from the emergency room, it is not unreasonable for Rush to distinguish Dr. Alexander's case on the basis of his refusal to pledge not to repeat his conduct in the future.

It may also be true that Rush had had enough of doctors not complying with the on-call policy and decided to make an example of Dr. Alexander. Peter Butler, who was president of Rush at the time Dr. Alexander's privileges were revoked, testified at trial that the 1987 corporate merger through which Skokie Valley Hospital became the Rush North Shore Medical Center brought with it a new, more business-like management philosophy. That philosophy also apparently included a "get tough" approach where it came to infractions by physicians and others. If this new approach toward discipline was applied even handedly, then the fact that infractions might have been dealt with more severely following the merger than before would not necessarily constitute evidence of discrimination. Title VII does not prohibit an employer from adopting tough or even what some might consider to be draconian sanctions for employee misconduct. Rather, Title VII prohibits an employer from imposing such sanctions in a discriminatory fashion based on race, national origin, religion, or sex.

The court finds that Plaintiff has not demonstrated by a preponderance of the evidence that Drs. Friedman and Abrams engaged in misconduct at least as serious as that alleged against him but were nonetheless treated more favorably by Rush as a result of intentional discrimination on Rush's part. Accordingly, Plaintiff has failed to prove pretext on this basis.

2. Whether the Derogatory Comments Made About Dr. Alexander by His Colleagues Provide a Sufficient Basis from which to Infer Discrimination by Rush

Dr. Alexander cites the racial epithets occasionally directed at him by his colleagues as "direct evidence" of discrimination. Plaintiff contends these comments demonstrate that Rush placed "substantial negative reliance" on illegitimate factors in reaching its decision to revoke Dr. Alexander's privileges. The evidence, however, fails to bear out Plaintiff's claim.

Evidence of a coworker's or even a supervisor's occasional or sporadic use of a slur or epithet directed at an employee's race, ethnicity or national origin is generally not enough, by itself, to support a claim under Title VII. *Hong*, 993 F.2d at 1266. Rather, the employee must demonstrate a nexus between the offending remarks and the employer's action, in this case Rush's decision to revoke Dr. Alexander's privileges. *See id.*

All of the offensive comments testified to at trial occurred before 1986. Two of the eight physicians to whom the comments were attributed had died by the time Dr. Alexander's privileges were revoked in 1988. Only two of the remaining six were among the nearly three dozen people involved in the decisionmaking process leading up to the revocation of Dr. Alexander's privileges. Only one, Dr. Chervony, was a member of the Rush Board of Trustees, the body with final authority over the revocation decision.

Assuming that Dr. Chervony made the "stupid Arab" comment attributed to him by Dr. Trippel, the fact is the statement was made more than ten years before the

revocation proceedings involving Dr. Alexander. Plaintiff introduced no evidence at trial to suggest that ethnic, racial or religious animus played any part in Dr. Chervony's actions in connection with the revocation. There is no evidence that Dr. Chervony dominated the debate on the MEC or the Board of Trustees regarding the proposed revocation of Dr. Alexander's privileges. Participants in the revocation process testified that Plaintiff's national origin, race and religion were never a topic of discussion during the proceedings. Indeed, Plaintiff has not established that a majority of the decisionmakers involved in the revocation process even knew, let alone cared, that Dr. Alexander was Egyptian, brown-skinned, and Muslim.

Plaintiff's reliance on the Supreme Court's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is misplaced. In that case, the Court held that where a plaintiff in a Title VII case had shown that gender played a motivating part in the employment decision that was the subject of the lawsuit, the employer could avoid a finding of liability only by showing by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. The evidence of gender-based discrimination in *Price Waterhouse* consisted of comments solicited by management in connection with a proposal to make the plaintiff a partner in the defendant accounting firm. Some of the comments were sexist, suggesting, for example, that the plaintiff was not feminine enough and too aggressive for a woman. The court reasoned that although stray sexist remarks made in the workplace would not necessarily prove that an employer relied on gender in making an employment decision,

evidence that the employer solicited and relied upon such comments in making its decision *would* constitute proof of illegal discrimination. *Id.* at 251.

In the case at bar, there is no evidence that the offensive remarks in question played any role in the decision-making process leading to the revocation of Dr. Alexander's privileges. The panels charged with considering Dr. Alexander's fate certainly never solicited comments regarding Plaintiff's national origin, race or religion, and there is no evidence that the hospital's decisionmakers ever entertained such comments. In short, Plaintiff has failed to show any nexus between the admittedly improper and obnoxious comments of some of his colleagues and Rush's decision to terminate his privileges.

D. Plaintiff's Motion for Leave to File a Second Amended Complaint

Plaintiff has brought a motion to file a second amended complaint to conform with the proofs, seeking to add a count for breach of an implied employment contract between Dr. Alexander and Rush. Whatever the merits of this additional claim, it is clear that Plaintiff and his counsel[6] waited far too long to bring it, raising it for the first time well after the close of a week-long bench trial and two and one-half years after the instant lawsuit was filed.

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[6] The court notes that Plaintiff had gone through a number of sets of attorneys before trial and that the attorneys who tried the case were not the same ones who filed the initial complaint and first amended complaint.

Rule 15(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> When issues not raised by the pleadings are tried *by express or implied consent of the parties*, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence . . . may be made upon motion of any party at any time[.]

(Emphasis added.)

Although evidence relevant to a possible breach of contract claim may have made its way into the record at trial, it did not do so without frequent and vigorous objection by counsel for Rush. Moreover, the court notes that it frequently reminded counsel for Plaintiff that they were trying a Title VII case—not a breach of contract case—and should stick to evidence relevant thereto. In light of Defendant's objections and the court's admonitions, it cannot reasonably be said that breach of contract issues were tried with the express or implied consent of the parties. Accordingly, the court will deny Plaintiff's motion.

V. CONCLUSION

Plaintiff has failed to show by a preponderance of the evidence that the reason advanced by Rush for revoking his privileges was a pretext for unlawful discrimination and has thus failed to prove that Rush violated Title VII. Judgment shall enter for Defendant and against Plaintiff. Additionally, Plaintiff's motion to file a second amended complaint is DENIED.

The foregoing incorporates and shall constitute, *inter alia*, the findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: June 26, 1995.

/s/_____
Samuel P. King
United States District Judge

App. 32

[Dated May 6, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DR. MARK F. ALEXANDER, Plaintiff,	)	
v.	)	No. 92 C 6125
RUSH NORTH SHORE MEDICAL CENTER, Defendant.	)	Judge James H. Alesia

MEMORANDUM OPINION & ORDER

The plaintiff, Dr. Mark Alexander, filed suit in this court alleging that the defendant, Rush North Shore Medical Center ("Rush" or "the hospital") violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e ("Title VII") by terminating his staff privileges at Rush. Rush moves this court for summary judgment, arguing that (1) Title VII does not protect Dr. Alexander because he is not an employee of defendant and (2) as a matter of law, Dr. Alexander cannot demonstrate that Rush considered Dr. Alexander's race, color, or religion when it revoked his staff privileges. For the reasons set forth below, this court grants Rush's motion in part and denies it in part.

I. STATEMENT OF FACTS

From 1976 to 1988, Dr. Alexander, an anesthesiologist, enjoyed staff privileges at Rush. (Plaintiff's Additional

Facts Requiring Denial Of Summary Judgment ("Pl.'s 12(n) Stmt.") at para. 1) As part of the responsibilities of maintaining staff privileges at Rush, an anesthesiologist must spend a portion of his time "on-call." (*Id.* at para. 4) If an emergency room doctor requests an on-call doctor to go to the hospital and to assist with a patient, the doctor must comply with the request as a condition of maintaining staff privileges. *(Id.)* Rush terminated Dr. Alexander's privileges because, Rush asserts, he failed to comply with such a request on February 20, 1988. (Mot. for Sum. J. at para. 3)

On February 20, 1988, an emergency room physician, Dr. Patricia Bitter, was treating a patient who suffered a head wound. (Stmt. of Undisputed Facts in Support of Defendant's Motion ("Def.'s 12(m) Stmt.") at para. 13) Dr. Bitter was concerned that the patient's breathing would become obstructed. (*Id.* at para. 14) She therefore attempted to secure an airway for the patient by performing an endotracheal intubation. (*Id.* at para. 15) After her unsuccessful attempt to intubate, she contacted Dr. Alexander, who was the on-call anesthesiologist. (*Id.* at paras. 17, 21) Dr. Bitter alleges that she requested Dr. Alexander to come to the hospital to assist, and he refused. (*Id.* at paras. 24-26) Dr. Alexander has consistently contended that Dr. Bitter never requested his presence. (Pl.'s 12(n) Stmt. at para. 10; Plaintiff's First Amended Complaint ("Compl.") at para. 16)

After this conversation, Dr. Bitter spoke with Dr. Upendranath Nimmagadda. (Def.'s 12(m) Stmt. at para. 19) According to Dr. Nimmagadda, Dr. Bitter told him that the anesthesiologist refused to assist her after he had apprised her that Rush did not own a suitable fiber-

optic laryngoscope. (*Id.*, Exhibit C, tab 11 (Dr. Nimmagadda letter to the hospital describing the incident 3 days after its occurrence); deposition testimony of Nimmagadda at 60-61) Dr. Bitter expressed her exasperation at her inability to procure assistance for the patient by exclaiming, "nobody wants to come here to help." (Def.'s 12(m) Stmt., Ex. C, tab 11) Dr. Nimmagadda went to the hospital and performed a tracheotomy on the patient. (*Id.*)

Meanwhile, Dr. Alexander had too contacted another medical professional associated with the hospital. Dr. Alexander contacted the respiratory therapist, Jake Strykowski. According to Strykowski, Dr. Alexander asked Strykowski whether the patient "really needed" Dr. Alexander's help. (Dep. of Strykowski at 45) Strykowski told him that the patient was becoming increasingly unresponsive and they called Dr. Alexander because of their inability to secure an airway through intubation. (*Id.* at 44, 76-77) Dr. Alexander advised Strykowski that he did not have experience with the type of flexible fiberoptic equipment that Rush used. (Def.'s 12(m) Stmt. at para. 33) Strykowski contends that he then told Dr. Alexander that Rush did in fact have the equipment with which Dr. Alexander has experience, and the conversation terminated. (Dep. of Strykowski at paras. 12, 46, 66) Dr. Alexander did not contact anyone else at the hospital that evening and did not go to the hospital to assist with the patient. (Def.'s 12(m) Stmt. at 27)

The next day, Dr. Bitter spoke to Dr. Abraham Chervony and lodged a complaint about the incident. (*Id.* at paras. 11, 25) The hospital, through Dr. Chervony, investigated the allegations. (*Id.* at para. 30) The hospital

gathered the statements of Drs. Bitter, Nimmagadda, Alexander, and Strykowski. (*Id.* at paras. 30, 32, 39) Upon reviewing these written statements and listening to testimony, the Rush Medical Committee Board ("MCB") agreed with Dr. Bitter and concluded that she had requested Dr. Alexander's assistance. (*Id.* at para. 44) Consequently, it voted to revoke Dr. Alexander's staff privileges. (*Id.* at para. 46) The Medical Appeals Board at the hospital agreed with the MCB's factual findings, yet believed revocation of staff privileges to be too harsh of a disciplinary measure. (*Id.* at paras. 51-52) The Board of Trustees, the final decisionmaker, reviewed the evidence and also concluded that Dr. Alexander failed to respond to a request for assistance. (*Id.* at paras. 47, 54) It, however, agreed with the MCB as to the appropriate discipline and revoked his privileges. (*Id.*) Thus, approximately 32 people reviewed the evidence and concluded that Dr. Bitter summoned Dr. Alexander and Dr. Alexander refused. (*Id.* at para. 43) Dr. Alexander filed suit pursuant to Title VII, alleging that the hospital did not terminate his privileges because it believed Dr. Bitter's version of the incident, but rather, because he is Egyptian, because he is a member of the Muslim faith, and/or because the color of his skin is brown. After discovery, Rush filed this motion for summary judgment.

II. DISCUSSION

A. Whether Title VII Protects Non-Employee Doctors against Discriminatory Decisions with Respect to Staff Privileges

Rush first argues that because Dr. Alexander was not an employee of Rush, Title VII does not protect him from

discrimination. Doctors, however, need not be employed by a hospital to merit protection under Title VII. *Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 422-25 (7th Cir. 1986); *Vakharia v. Swedish Covenant Hosp.*, 765 F. Supp. 461, 463-69 (N.D. Ill. 1991); *Ellerby v. Illinois Circuit Court*, 46 Fair Emp. Prac. Cases (BNA) 524, 526 (N.D. Ill. 1988); cf. *Pelech v. Klaff-Joss, LP*, 815 F. Supp. 260, 263 n.3 (N.D. Ill. 1993) (Judge Aspen noting, that the Seventh Circuit in *dicta* has cast doubt as to the validity of *Doe*, but holding that District Courts are bound by *Doe* until the Seventh Circuit reexamines its position). A plaintiff-doctor merits Title VII protection if the hospital controlled the doctor's employment opportunities. *E.g.*, *St. Joseph's Hosp.*, 788 F.2d at 423-24. A hospital controls these opportunities through the bequest of staff privileges; without these privileges, a doctor cannot treat the hospital's patients. *Vakharia*, 765 F. Supp. at 466-68. Thus, a hospital incurs Title VII liability by revoking staff privileges for discriminatory reasons. *Id.* at 466, 469 (expressly holding that Title VII prohibits a hospital from revoking the staff privileges of an anesthesiologist). Title VII applies in this case because Rush revoked Dr. Alexander's staff privileges.

Rush responds by arguing that Alexander has not alleged any actionable employment relationship and a plaintiff cannot rely on facts outside of the pleadings on a motion for summary judgment. (Def.'s Reply Br. at 5 (citing *Samuels v. Wilder*, 871 F.2d 1346, 1349-50 (7th Cir. 1989))) Dr. Alexander's complaint, however, does sufficiently plead an employment relationship with Rush's patients and subsequent interference with that relationship by Rush. *See* Fed. R. Civ. P. 8(a) (requiring "short and plain statement"). Dr. Alexander alleges that

he "worked exclusively for Rush patients." (Compl. at para. 14) He further alleges that "Rush at all times had the ability to terminate [him]" and that Rush did in fact terminate his staff privileges. (Compl. at paras. 14, 17, 19, 22) This language conveys an allegation that Rush interfered with Dr. Alexander's relationship with the Rush patients, for whom he worked exclusively, by revoking his privileges. Thus, Rush's motion is denied as to the grounds that Dr. Alexander did not adequately allege an employment relationship with Rush patients.

B. Whether the Plaintiff Can Demonstrate that the Defendant Intentionally Discriminated Against Him Because it Terminated Him Without an Honest Belief as to His Misconduct

Rush argues that it is entitled to judgment because, as a matter of law, Dr. Alexander cannot demonstrate that it intentionally discriminated against him. (Mot. for Sum. J. at para. 3) In a Title VII case based on a theory of disparate treatment, a plaintiff can establish a *prima facie* case by demonstrating by a preponderance of the evidence that (1) the plaintiff was a member of a protected class, (2) the plaintiff was meeting the employer's legitimate expectations (3) but was nonetheless discharged, and (4) the employer sought a replacement. *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1261 (7th Cir. 1993). The parties do not dispute the satisfaction of elements one, three and four.

To demonstrate that he was meeting Rush's legitimate expectations, Dr. Alexander contends that Dr. Bitter falsely accused him of failing to respond to her request

for assistance. (Pl.'s Resp. Mem. at 10-11)[1] Thus, he essentially argues that because her allegation is false, the incident did not occur. *(See id.)* Because the incident did not occur, he argues, he was meeting Rush's legitimate expectations and thus, has demonstrated a *prima facie* case of discrimination. *(See id.)*

Assuming, *arguendo,* Dr. Alexander has established a *prima facie* case, Rush can rebut the resulting inference of discrimination by articulating a legitimate, nondiscriminatory reason for the discharge. *McCoy v. WGN Continental Broadcasting Co.,* 957 F.2d 368, 371 (7th Cir. 1992). Rush has sufficiently rebutted the presumption here. An employer terminates an employee for a legitimate, nondiscriminatory reason if it "honestly believed" that the alleged instance of misconduct occurred. *Lenoir v. Roll Coater, Inc.,* 13 F.3d 1130, 1133 (7th Cir. 1994); *Billups v. Methodist Hosp.,* 922 F.2d 1300, 1304 (7th Cir. 1991). Here, Rush has consistently attested that it honestly believed the incident occurred, and moreover, that it still believes that Dr. Alexander refused Dr. Bitter's request for assistance. (Def.'s Mem. in Supp. at 12-13; Mot. for Sum. J. at para. 3; Def.'s Reply Br. at 10-11) In fact, through three levels of review involving 32 decisionmakers, Rush consistently maintained its belief in plaintiff's misconduct. Thus, Rush has met its burden of production. *See Lenoir,* 13 F.3d at 1133; *Billups,* 922 F.2d at 1304.

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[1] The plaintiff concedes that if he did in fact fail to respond to a request for assistance, then he failed to meet Rush's legitimate expectations. (Pl.'s 12(n) Stmt. at para. 8, 23). Thus, the issue here is not the validity of Rush's reason, but rather, its factual basis.

Dr. Alexander is now afforded the opportunity to show that Rush's proffered belief in his misconduct is pretextual. *McCoy,* 957 F.2d at 371. He can adduce such a showing by demonstrating that the hospital's explanation has no basis in fact or that the explanation is not the actual reason. *Lenoir,* 13 F.3d at 1133. A defendant can prevail on a motion for summary judgment by demonstrating that no genuine issue of material fact exists as to whether its belief in the plaintiff's guilt was honestly held and consequently, that the plaintiff cannot show pretext. *Id.*

In the instant case, Rush has shown that it harbored an honest belief. The only evidence adduced by Dr. Alexander to demonstrate that Rush did not have an honest belief is his own avowal that the incident did not occur. Yet the Seventh Circuit has held that as a matter of law, a plaintiff's statement, without more, denying the occurrence of the disputed incident is insufficient. *Billups,* 922 F.2d at 1303. Because plaintiff cannot rebut the evidence that 32 independent decisionmakers all reached the same good faith conclusion as to the events of February 20, 1988, he cannot demonstrate a genuine issue of material fact that defendant's honest belief in his misconduct is mere pretext.

Therefore, because Dr. Alexander failed to adduce evidence to rebut the defendant's showing of honest belief, Rush is entitled to summary judgment on this issue. Thus, at trial, the plaintiff cannot attempt to establish a Title VII violation case by presenting evidence that the incident did not occur.

C. Whether the Plaintiff Can Demonstrate that the Defendant Intentionally Discriminated Against Him Because it Treated Similarly Situated Employees Outside of the Protected Class Differently

Dr. Alexander argues that if the hospital did in fact harbor an honest belief as to Dr. Alexander's guilt, it nonetheless violated Title VII because it reacted discriminatorily to that belief. (Pl.'s Resp. Mem. at 11 n.2) When the treatment of similarly situated employees is at issue, the plaintiff can establish a *prime facie* showing of discrimination by demonstrating that (1) plaintiff was a member of a protected class, (2) plaintiff was discharged although performing satisfactorily, and (3) the defendant treated similarly situated employees outside of the protected class more favorably. *Lenoir,* 13 F.3d at 1132; *Stotts v. Memphis Fire Dep't,* 858 F.2d 289, 301 (6th Cir. 1988). The record shows that the parties do not dispute that Dr. Alexander is a member of the protected class, that Rush revoked his privileges or that he was performing his job satisfactorily until February 20th. The remaining issue is whether he has established that Rush has treated similarly situated employees outside of the protected class differently. Plaintiff alleges he is similarly situated to four doctors not in the protected class who were each treated more favorably.

(1) Dr. Britt

Dr. Alexander first avers that he is similarly situated to Dr. Wilbur Britt. On the evening of February 20, Dr. Bitter had contacted another on-call doctor, Dr. Britt. Dr. Britt did not respond to the call because he had forgotten to carry his pager with him. (Pl.'s Resp. Mem. at 5; Def.

Reply Br. at 12 n.6) The effect of Dr. Britt's negligence is the same as Dr. Alexander's wilful refusal—an emergency room physician needed the assistance of an on-call physician who shirked his duties and left the emergency room physician and the patient unaided. However, as Rush notes, "commission" differs from "omission." (Def. Reply Br. at 12 n.6) Dr. Alexander wilfully refused to assist the patient; Dr. Britt negligently forgot his pager and could not be contacted to assist the patient. It is no surprise and well within reason that Rush considered intentional wrongdoing as more egregious than carelessness. *See Stotts,* 858 F.2d at 301 n.9. In Title VII cases, employees are not similarly situated when one acts intentionally and the other acts negligently. *Stotts,* 858 F.2d at 301 n.9. Thus, the doctors' respective errors are not comparable.

Moreover, Dr. Alexander's misconduct differs from Dr. Britt's in another important aspect. When apprised of his error, Dr. Britt accepted full responsibility, apologized and assured Rush that the incident would not be repeated. (Pl.'s 12(n) Stmt., Ex. M (minutes of the Medical Executive Committee); Def. Reply Br. at 12 n.6) When the hospital advised Dr. Britt of his discipline, a written reprimand, it noted that it was impressed by his acceptance of responsibility and assurances against future mishaps. (Pl.'s 12(n) Stmt., Ex. M) Dr. Alexander, on the other hand, has consistently maintained that he did nothing wrong. (Pl.'s Resp. Mem. at 11) As previously discussed, the hospital honestly believed that Dr. Alexander refused a request for assistance. Thus, it could understandably discipline him more severely than it did Dr. Britt because it would appear to Rush that Dr. Alexander was attempting to escape culpability. Because Dr.

Britt accepted responsibility for his error and Dr. Alexander attempted to evade responsibility for the wilful misconduct of which the hospital believed he was guilty, Dr. Britt is not similarly situated to Dr. Alexander.

(2) Dr. Taxman

Dr. Alexander alleges he is also similarly situated to Dr. Taxman. In 1984, Dr. Taxman did not respond to a page while on call. Dr. Taxman did not respond, it turned out, because he was caught in heavy traffic in Chicago. (Pl.'s 12(n) Stmt., Ex. N (letter from MEC to Taxman noting that Taxman was "unavailable to respond" to a page because he was in the city); Def.'s Reply to Pl.'s 12(n) Stmt., Ex. C (note of Ralph Hutchins, President of the MEC, re: a telephone call from Dr. Taxman stating "no way he could get to the hospital")) Like Dr. Britt, Dr. Taxman did not voluntarily refuse a request for assistance. Rather, he, perhaps negligently, posited himself in a position from which he could not adequately respond to such a request. Dr. Alexander has not controverted this explanation. Because his error stems from carelessness, it also differs from Dr. Alexander's intentional refusal. As such, Dr. Alexander is not similarly situated to Dr. Taxman.

(3) Dr. Friedman

Dr. Alexander avers that he is similarly situated to Dr. Friedman. On two occasions, Dr. Friedman "refused to respond to . . . calls from the Emergency" Room. (Pl.'s 12(n) Stmt., Ex. O; Def.'s Reply Br. at 12 n.6) The hospital suspended Dr. Friedman, and Dr. Friedman

resigned shortly thereafter. (Def. Reply Br. at 12 n.6) Rush avers that Friedman did not refuse to respond to a call for assistance from a doctor who currently was treating a patient, but rather, that he refused to return the phone calls of emergency room personnel who wished to schedule him for the on-call roster. (*Id.*)

If this explanation is accurate, then Drs. Alexander and Friedman are not similarly situated. Dr. Friedman allegedly refused to be placed on the on-call roster. Thus, unlike Dr. Alexander's refusal to assist a specific patient, Dr. Friedman's misconduct would not have endangered a patient's welfare. Rush cannot be considered to have acted unreasonably or arbitrarily because it differentiated between misconduct that endangers a person and misconduct which does not. *See Johnson v. Artim Transp. Sys. Inc.,* 826 F.2d 538, 544 (7th Cir. 1987), *cert. denied,* 486 U.S. 1023, 108 S.Ct. 1998, 100 L.Ed.2d 229 (1988). As such, Dr. Alexander would not be similarly situated to Dr. Friedman.

Rush, however, has failed to show the Court that no genuine issue exists with respect to the facts Rush has averred. Rush attributed its assertion that Dr. Friedman only refused to be placed on the on-call roster, rather than refused a specific request to go to the hospital, to Dr. Chervony. (Def. Reply Br. at 12 n.6 (citing, Dep. of Chervony at 26-27)) Yet Dr. Chervony testified that he did "not remember that [Dr. Friedman] refused to come to the emergency room." (Dep. of Chervony at 26-27) Rush cannot demonstrate the nonexistence of a genuine issue of material fact by simply noting that one person does not remember it being to the contrary. *Smith v. Joliet,* 965 F.2d 235, 238 (7th Cir. 1992) (plaintiff did not

establish a genuine issue of material fact as to whether the police department received excessive force complaints by merely presenting the deposition of an officer who did not remember the absence of complaints); *Unterreiner v. Volkswagen of Am., Inc.*, 8 F.3d 1206, 1210 (7th Cir. 1993) (party does not present a genuine issue of material fact by submitting affidavits which purport to establish a given fact if the affiant admits that his memory is faulty). Thus, Rush has failed to show that Dr. Friedman is not similarly situated to plaintiff.

(4) Dr. Abrams

Dr. Alexander also alleges he is similarly situated to Dr. Bernard Abrams. In 1986, Dr. Abrams failed to respond to a call when he was the on-call surgeon. (Pl.'s Resp. Mem. at 3; Ex. I to Pl.'s 12(n) Stmt.) As a result, the hospital suspended his staff privileges. (*Id.*) Five days later, when Dr. Abrams noted that the hospital may have violated Dr. Abrams' due process rights by suspending him without notice, Rush reinstated his privileges. (*Id.*) Dr. Abrams then discussed the episode with Rush; his version "differed from the allegation" the hospital received. (*Id.*) The hospital advised Dr. Abrams that a proper response to an emergency room call included a trip to the hospital to at least assess the patient. (*Id.*) Rush then concluded "no further suspension was deemed necessary." (*Id.*) Thus, when Dr. Abrams failed to respond to a call, Rush suspended him, and for only five days. In response, Rush merely contends "if Dr. Alexander seeks to avoid summary judgment by arguing that he was treated differently than Dr. Abrams, it is his burden to offer facts which show that he and Dr. Abrams were

similarly situated." (Def.'s Reply Br. at 10 (citing *St. Mary's Honor Ctr. v. Hicks,* 113 S.Ct. 2742, 2747 (1993))) Yet Dr. Alexander has produced uncontroverted evidence from the hospital describing Dr. Abrams' misconduct as a "failure to respond." (Pl.'s 12(n) Stmt., Ex. I) Interestingly enough, the hospital termed Dr. Alexander's misconduct failure to "appropriately" respond. (Pl.'s 12(n) Stmt., Ex. U) The Court cannot conclude that "failure to respond" implicates different misconduct from that of failure to "appropriately" respond. Moreover, with respect to the aforementioned two incidents, Rush presented evidence and explanation as to how each doctor's "failure to respond" was distinguishable from Dr. Alexander's "failure to respond." (Def.'s Reply Br. at 12 (arguing that failure to respond differs if it involves negligence as opposed to intentional wrongdoing)) With respect to Dr. Abrams, however, Rush has neglected to provide any explanation for distinguishing the two.

On a motion for summary judgment, the moving party has the initial burden of demonstrating that no genuine issue exists as to a material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Here, Rush has failed to meet this burden. The precise character of Dr. Abrams' "failure to respond" is a material fact as his "failure to respond" may be comparable to that of Dr. Alexander; thus, this incident could demonstrate that Rush treated a similarly situated caucasian doctor differently than it treated an Egyptian doctor of the Muslim faith.

In summary, a genuine issue of material fact exists as to whether Drs. Abrams and Friedman were similarly situated to Dr. Alexander. No genuine issue exists with

respect to Drs. Britt and Taxman, and accordingly, the hospital's motion is granted to this extent. *See* Fed. R. Civ. P. 56(d). At trial, Dr. Alexander may not attempt to show a *prima facie* case by presenting evidence regarding the infractions of Drs. Britt and Taxman.

CONCLUSION

For the foregoing reasons, the court grants Rush's motion for summary judgment with respect to the similarity of Dr. Alexander to Drs. Britt and Friedman and with respect to the honesty of Rush's belief in Dr. Alexander's misconduct. The issue that remains for trial is the comparability of Dr. Alexander's misconduct to that of Drs. Abrams and Taxman and the resulting sanctions imposed by Rush.

Date: MAY 0 6 1994

/s/_____
JAMES H. ALESIA
United States District Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 7 , 1997.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

DR. MARK F. ALEXANDER,

Plaintiff-Appellant,

No. 95-2782 vs.

RUSH NORTH SHORE MEDICAL CENTER,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6125—Samuel P. King, *Judge*

ORDER

The opinion issued in the above-entitled cause on November 25, 1996, is amended as follows:

The following text and footnote should be inserted as a new paragraph following the end of the first line on page 13:

We are aware that at trial, the district court—relying on *Doe*—permitted neither Dr. Alexander nor Rush North Shore to introduce evidence of Dr. Alexander's "employment status". This fact, however, does not require us to remand this case to the district court for a determination of whether Dr. Alexander was an employee of the hospital or an independent contractor. At the summary judgment stage, both parties had the opportunity to fully address this issue. Thus, we can appropriately rely upon that record, as well as the uncontested facts in the Pretrial Order,[3] to conclusively determine that Dr. Alexander was an independent contractor.

FURTHER, on consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause, no judge in active service has requested a vote and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing is therefore DENIED.

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[3] Moreover, we examined the contested facts from the Pretrial Order (relevant to determining the employee/independent contractor issue, *see* Pretrial Order, p. C-4 ¶ 35), in the light most favorable to Dr. Alexander. In that regard, we determined that Dr. Alexander was an independent contractor even though he did not supply his own equipment or assistants, he was required to spend a certain amount of time "on call," and he was assigned most of his operating room patients by the hospital's anesthesiology section head on a daily basis.

2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce,

and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting, commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. §151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. §151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transmission, or communication among the sev-

eral States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United states; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. §401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. §1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to

work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

2000e-5. Enforcement Provisions

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is

adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. in the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought

by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more

than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has

his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.